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# In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 484

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

RALADAM COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION

### OPINION BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 469) is reported in 42 F. (2d) 430.

### JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 28, 1930. (R. 469.) Petition for certiorari was filed September 27, 1930, and was granted November 3, 1930, "the briefs and argument to be limited to the question of the jurisdiction of the Federal Trade Commission." (R. 480.)

Jurisdiction of this Court rests on Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. *Federal Trade Commisison* v. *Klesner*, 280 U. S. 19.

## QUESTION PRESENTED

Whether the Federal Trade Commission has jurisdiction to issue an order against the vendor of an alleged obesity remedy to cease and desist from representing that its product is safe and scientific, based on findings of the Commission upon conflicting evidence that these representations are false, that they tend to deceive the public, and that the remedy is sold in interstate commerce in competition with other alleged remedies for obesity.

## STATUTE INVOLVED

The relevant portion of Section 5 of the Federal Trade Commission Act is set forth in the Appendix, pp. 41–44, *infra*.

## STATEMENT

A complaint issued by the Federal Trade Commission charged that respondent made false statements in aid of the sale of its alleged obesity cure, designated "Marmola Prescription Tablets," which constituted unfair methods of competition in interstate commerce in violation of Section 5 of the Federal Trade Commission Act. (R. 2–6.) After re-

spondent had answered and testimony had been taken before an examiner, the Commission filed a report of its findings of fact and conclusion and issued a cease and desist order. (R. 7, 21, 26.)

The Commission found that respondent's Marmola Prescription Tablets were manufactured for it by Parke, Davis & Co., under a formula furnished and owned by respondent; that the asserted effectiveness of respondent's fat-reducing remedy was principally based on one-half grain of thyroid which each tablet contained; that the tablets also contained three powerful laxatives; and that upon the box in which the tablets were sold were directions to take internally four tablets a day for a period of from 60 to 90 days. (R. 21–23.) In Paragraph Six the Commission found that respondent advertised Marmola in newspapers, magazines, periodicals, and other publications of general circulation in the United States and in these advertisements made the following representations (R. 23):

> 1. That the preparation of said Marmola is the result of, and is based upon, scientific research, knowledge and accuracy;
>
> 2. That its medical properties are safe, pleasant and effective in their action in the removal of excess flesh from the body;
>
> 3. That the same may be used by purchasers thereof without discomfort, inconvenience or danger of harmful results to

the physical health of the users of such compound;

4. That the said Marmola is a scientific method for the treatment of obesity and is based on many years of scientific research in the United States of America and in foreign lands.

In Paragraphs Seven and Eight the Commission found that each of these representations was false and misleading and that they tended to mislead and deceive the purchasing public. (R. 23–24.)

The Commission also found that respondent sold Marmola Prescription Tablets to wholesale druggists and jobbers in every State in the United States; that these druggists and jobbers resold the tablets to retail druggists throughout the country; and that the latter, in turn, resold them to consumers. (R. 22.) The Commission (Paragraph Four) found that respondent in the course and conduct of its business was in competition throughout the United States with others likewise engaged in offering for sale and selling "other methods, means, remedies and appliances for dissolving or otherwise removing excess flesh of the human body." (R. 22.)

The Commission concluded that respondent's practices "are to the prejudice of the public and respondent's competitors and are unfair methods of competition in commerce and constitute a violation of" the Federal Trade Commission Act. (R.

25.) It consequently ordered respondent, in connection with advertising and selling Marmola in interstate commerce (R. 26–27), to cease and desist from:

1. Representing that "Marmola" is a scientific and accurate method for treating obesity;

2. Representing that the formula from which "Marmola" is made is a scientific formula;

3. Representing that "Marmola" is the result of scientific research;

4. Representing that "Marmola" can be taken without the advice and direction of competent medical authority as a safe and harmless remedy in the treatment of obesity;

5. Representing that "Marmola" can be taken with no harmful result to physical health without the advice and direction of competent medical authority;

6. From representing "Marmola" as a remedy for the treatment of obesity unless such representation is accompanied by a statement that "Marmola" can not be taken with safety to physical health except under the direction and advice of competent medical authority.

Respondent within due time filed a petition in the Circuit Court of Appeals for the Sixth Circuit praying that the Commission's order be set aside. (R. 373–380.) The petition did not allege any error in the findings contained in Paragraph Four

or Paragraph Six of the Commission's report relating, respectively, to the sale in interstate commerce of competitive remedies and appliances and to the representations made by respondent in advertising Marmola. (R. 376–378.) The Commission filed an answer in the nature of a cross bill asking for a decree affirming its order and later made a motion to strike out certain portions of respondent's answer to this cross bill. (R. 385, 387, 452.)

The Circuit Court of Appeals, without discussing whether respondent's representations were calculated to mislead the public to which they were addressed, said that whether respondent's remedy was scientific or not depended upon the latitude of definition given that word, and that whether its remedy was safe or not could not be categorically answered, in view of the conflict between the testimony of the physicians called as witnesses by the Commission and those called by respondent. (R. 472–476.) The court accordingly interpreted the representations of respondent against which the Commission's order was directed as expressions of opinion and said that as there was no contention that the representations were not made in good faith or that they "were so obviously and clearly unsound that they could not plausibly be held by any intelligent person," the Federal Trade Commission had no authority to order respondent to cease and desist from making such representations. (R. 472, 476–477.) The court, under this view of the

law, and the facts, considered it immaterial that there was testimony to support the Commission's findings that respondent's representations were false and misleading.

The court also said that the record did not disclose any competitors who would be injured by respondent's practices except physicians and manufacturers of "other commercially exploited remedies for obesity." (R. 479.) It said that the Act was not intended to protect "this kind of trade and commerce"; that injury to the public alone was not sufficient to establish unfair competition within the meaning of the Act; and that the Commission in this case therefore lacked jurisdiction. (R. 477–480.) A decree was entered reversing the Commission's order. (R. 469.)

---

This Court has limited the argument to the question of the Commission's jurisdiction, but we conceive that certain facts disclosed by the testimony may be of importance in deciding the jurisdictional question. We therefore call attention to the following testimony:

Respondent, a Michigan corporation with offices in Detroit, Michigan, was organized in January, 1927, to take over the business, except the mail-order business, of the Marmola Company. (R. 38, 46–47.) The latter had been selling Marmola tablets since 1907, but in 1927 it was dissolved following a citation by the Post Office authorities to show

cause why a fraud order should not be issued against it and hearings thereon. (R. 40, 44.)

Respondent does a gross annual business of about $600,000 and sells over 1,000,000 boxes of Marmola a year. (R. 34, 48.) Each box, which retails for $1, contains 36 Marmola tablets, a booklet[1] which gives directions and advice for taking Marmola and names its ingredients, an envelope with four sample Dilaxin pills (a laxative preparation sold by respondent), and a circular headed "Use Dilaxin with Marmola." (R. 34, 43, 56.)

Edward D. Hayes, the owner of substantially all the stock of respondent, is the general manager and his sister the vice president of respondent and a Miss Moss and a Miss Hannon are the only other officers or directors of respondent. (R. 33, 46.) Hayes was the president of the Marmola Company and owned it at the time of its dissolution. (R. 39, 45.) He and one Ray, of the Ray Chemical Company of Detroit, organized the Marmola Company for the purpose of marketing a formula for the treatment of obesity which the Ray Chemical Company had evolved. (R. 39, 49.) During the early years of the Marmola Company this formula was

[1] This booklet is a part of Com. Ex. 2. By stipulation of the parties this and other exhibits were treated as physical exhibits in the Circuit Court of Appeals (R. 2) and they have been filed with the Clerk of this Court. There are only trivial variations between this booklet and the booklet (R. 417–424) used by respondent after the Commission issued its cease and desist order (R. 383).

made by the Ray Chemical Company, and it was subsequently made by two other drug concerns before being made by Parke, Davis & Co., the present manufacturer of Marmola. (R. 38–39.) Hayes is not a doctor, has never studied medicine, does not have a degree of any kind, knows nothing about drugs except what he has gathered as a layman from his business experience, has not carried out any scientific research, and was not certain that he had known the doctor who originated the formula for Marmola. (R. 49, 52, 54.) Since 1907 the quantity of thyroid in Marmola tablets has been decreased, first from one grain to three-fourths of a grain and then from three-fourths of a grain to one-half a grain, but otherwise there has been no material change in the formula. (R. 50–52.) The various ingredients in Marmola, other than thyroid and the three laxatives, are used to give it body and respondent does not claim that they have any effect in bringing about weight reduction. (R. 53, 422.)

When thyroid, which is made from the thyroid gland of animals, is taken internally it accelerates the patient's consumption of oxygen, thereby increasing the burning up of food products and bodily tissues. (R. 80, 87, 106.) Thyroid so taken enters the blood stream and stimulates all cells—the muscle tissues, the kidneys, the liver, the nervous system, and the brain. (R. 80, 106.) In this oxydizing process carbohydrates (chiefly sugar)

are first consumed and then fat. (R. 198–199.) The normal consumption of oxygen, dependent upon weight, age, and sex, has been measured and is called the basic metabolic rate. (R. 273.) Thyroid increases the rate of metabolism whether the individual's metabolic rate is normal, definitely below normal (hypothyroidism), or definitely above normal (hyperthyroidism). (R. 81, 92.)

Thyroid was first used about 40 years ago as a remedy for cretinism and myxedema, diseases where the thyroid gland is either largely absent or atrophied. (R. 173.) Some of the physicians testifying for the Commission had used thyroid, in connection with dietetic control, as a treatment for obesity when the patient's metabolic rate was subnormal. (R. 93, 116.) But in only a very small per cent of obesity cases is the condition due to deficient thyroid glands. (R. 174.) Insufficient pituitary, suprarenal, or reproductive glands may cause obesity, and one doctor testified that probably 95% of all cases were caused by overeating and lack of exercise; that is, by an intake of food in excess of the amount consumed by the body's activities. (R. 174–175.) According to a second doctor, true thyroid obesity was the rarest type known and about 90% of all cases of obesity were due to overeating and underexercise. (R. 147.) A third doctor reported, after going over his records in obesity cases, that only about 2% to 3% showed hyperthyroidism in the metabolism tests. (R. 216.)

Thyroid gives only temporary relief. Soon after its use has been stopped a patient will begin to take on fat again unless he employs other methods of weight reduction. (R. 185–186.) And if a person takes Marmola as directed by respondent he is likely to weaken his organic resistance to obesity. Such a person would introduce into his system a much larger amount of thyroid than the normal secretion of the thyroid gland, with a consequent tendency to underfunctioning and degeneration of that gland. (R. 73–75.)

Of the eleven physicians called as witnesses, five by the Commission and six by respondent, not one testified that he prescribed Marmola. None of these physicians administered thyroid, or would administer a daily two-grain dose (the amount contained in four Marmola tablets), without giving the patient a prior physical examination. (R. 85, 116, 141, 177, 217, 254, 285, 308, 348, 356, 366.) All the physicians called by the Commission stated that Marmola could not be self-administered in the doses advised and suggested by respondent without endangering the health of a substantial number of users. (R. 73, 115–116, 141–142, 187–188, 215.) There was testimony that taking this amount of thyroid would in very many cases cause a toxic condition, characterized by weakness, rapid heart action, nervousness, tremors, sweating, sleeplessness, diarrhea, fast pulse, or even delirium (R. 73, 115, 141, 215); that thyroid should never be taken by a per-

son over sixty years old (R. 177) or by a person having kidney trouble (R. 179, 216); that it would always be harmful to a person with heart lesions (R. 179); that it should be given most cautiously to a woman at the time of her change in life (R. 216); that in some cases it would lower the general health level and make the user more susceptible to infection (R. 216); that a physician before administering thyroid should determine the patient's blood pressure, his heart action, and the condition of his kidneys, and inquire into his age and personal habits (R. 177).

Illustrations of the effect of the self-administration of thyroid were given. A woman who had started taking two grains of thyroid a day or less was thrown into a state of hyperthyroidism with a swelling of the thyroid gland and had to be put in ice and given complete rest to prepare her for an operation to remove the gland. (R. 219.) In another case, a woman, if she took a grain a day for five or six days, immediately got palpitation and a very fast pulse. (R. 148.) A very stout woman, after taking a grain and one-half a day, had vertigo, palpitation, headaches, and was exceedingly nervous. (R. 148.) Taking one-fourth of a grain of thyroid has been known to cause very harmful results.[2] (R. 186.)

[2]An offer of testimony that a patient who stated that she had been taking Marmola showed symptoms of overdoses of thyroid was excluded by the examiner on the respondent's objection that the testimony was hearsay. (R. 75–79, 108.)

Dr. Haverstock, one of respondent's witnesses, gives an obese person, after a superficial physical examination lasting ten or fifteen minutes, a *minimum initial* daily dose of six grains of thyroid, which he sometimes later increases to forty grains. (R. 365–366.) He never prescribes exercise or diet and generally increases the thyroid dose until he observes in the patient a trembling of the knees or hyperthyroidism. (R. 363, 369.)

The respondent's own witnesses seem to discredit any such medical practice. Dr. Keeton usually gives two grains of thyroid a day. (R. 248.) The average dose of Dr. Stone, who has treated very few obesity cases (R. 283), is one grain given three, four, or even five times a day (R. 275). Dr. Tenney begins with two-fifths of a grain three or four times a day. (R. 300, 309.) Dr. Hulbert always first subjects an obese person to diet and exercise and gives thyroid only if he finds that a glandular condition is a contributing cause; he indicated three grains a day as an average dose. (R. 335, 339.) Dr. Funck starts with three or four grains a day, sometimes more and sometimes less. (R. 351–352.)

Hayes, the owner of substantially all of respondent's stock, testified that bath salts for the reduction of flesh were being sold in the different States. (R. 66.) One of the physicians named four different antifat medicines or remedies which were then being sold in interstate commerce. (R. 183–

184.) The Director of the Bureau of Investigation of the American Medical Association named 18 remedies for the treatment of obesity which he believed, after investigation, were all being marketed. (R. 111–112.) Six of them he found currently on sale in Chicago drug stores. (R. 112.) He testified that the concerns marketing three others were then in business and that four others had been advertised in 1928. (R. 159–163.) The remaining remedies he had seen advertised or had seen letters of inquiry concerning them subsequent to January 1, 1927. (R. 132.)

### SPECIFICATION OF ERRORS TO BE URGED

Among the specifications of errors set forth in the Commission's petition for writ of certiorari were the following:

(1) The Circuit Court of Appeals erred in denying the jurisdiction of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act to order the discontinuance of false representations, made in connection with the advertising and offering for sale of a product, which are calculated to mislead a substantial part of the purchasing public without evidence of injury to honest competitors.

(2) The Circuit Court of Appeals erred in drawing an inference that there was no competition between respondent and honest dealers engaged in the manufacture of similar remedies, in the absence of any proof of that fact.

(3) The Circuit Court of Appeals erred in holding that the findings of the Commission that "Marmola" was not a scientific or safe remedy for the treatment of obesity were not, for purposes of appellate review by the Circuit Court of Appeals, findings of fact but expressions of opinion, and, as such, not conclusive if supported by testimony, as provided in Section 5 of the Federal Trade Commission Act.

(4) The Circuit Court of Appeals erred in holding in effect that the findings of the Commission that "Marmola" was not a scientific or safe method for the treatment of obesity or the removal of excess flesh were not supported by testimony, and were, therefore, not conclusive upon review by the Circuit Court of Appeals, as provided in Section 5 of the Federal Trade Commission Act.

Respondent's brief in opposition to the petition for writ of certiorari (pp. 12–16) contended that the only question decided by the Circuit Court of Appeals was that the Commission had no jurisdiction. Since the order of this Court allowing certiorari limited the briefs and argument to the question of the jurisdiction of the Federal Trade Commission (R. 480), the Commission will urge the foregoing specifications of error only from the standpoint of the Commission's jurisdiction. The third and fourth specifications should perhaps be combined and rephrased as follows to bring out the

jurisdictional implications which the Commission will urge:

The Circuit Court of Appeals erred in holding that respondent's representations that "Marmola" was a safe and scientific remedy for obesity were expressions of opinion and, whether or not they are properly designated expressions of opinion, in holding that the Commission did not have jurisdiction under Section 5 of the Federal Trade Commission Act to proceed against such representations.

## SUMMARY OF ARGUMENT

I. The court below erroneously adopted the view that the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act is limited to those situations indicating a substantial tendency to restraint of trade or monopoly and to "palming off" cases. Such a construction does not accord with the words of the statute, has been rejected by this Court (*Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483), and is inconsistent with the purposes and intent of Congress as disclosed by the reports of the Committees dealing with this legislation.

The court below erroneously inferred that the dealers in obesity remedies with which respondent was in competition were "relatively disreputable" and not engaged in "legitimate activities." But the Commission had jurisdiction even if this inference was warranted. A proceeding to stop the sale of goods in interstate commerce by means of mis-

representation is "to the interest of the public" where the deception affects the health of the public rather than its pocketbook. And there is a public interest in stopping advertising which deceives a substantial number of those to whom it is directed although misrepresentation of a similar character is prevalent in the trade. *Federal Trade Commission* v. *Winsted Hosiery Co., supra.*

The requirements of Section 5 do not cease to apply because its enforcement may incidentally benefit private traders engaged in a trade which is in disrepute with the "best people." Such a limitation upon the scope of the section implies that a trade can, by the very inferiority of its commercial and ethical standards, acquire immunity from a law of general application. If it is generally desirable to maintain free and fair competition, it can not reasonably be supposed that Congress intended to leave competition unregulated where the trade was questionable, or intended that in such a trade competition in dishonesty be substituted for competition in efficiency.

Nor was the Commission deprived of jurisdiction because it was not affirmatively shown that respondent's competitors were guiltless of the same or of other forms of misrepresentation. If such a showing is essential to the Commission's jurisdiction, competition in dishonest methods can proceed unregulated in any trade where fraud and deception is general. If in every proceeding under

Section 5 it must be affirmatively shown that competitors have not been guilty of dishonest practices, the collateral issues thus raised will hopelessly confuse the primary issue.

II. The court below treated the question of the Commission's jurisdiction as dependent upon whether the words "safe" and "scientific" could be conclusively determined to be true or false as applied to respondent's remedy, and the court seems to have held that the Commission did not have jurisdiction because, if a sufficiently broad definition is adopted, they may be truthfully applied to respondent's remedy. We submit that the real issue is whether respondent's advertisements tended to mislead and deceive a substantial part of the purchasing public. The Commission found that they did have such a tendency.

Respondent advertised its remedy as safe, pleasant, and free from harmful consequences. Its unqualified statements were a representation that medical opinion was in agreement that the remedy could be safely taken, although this was a matter of sharp scientific and medical controversy. It represented the question of safety to be a fact when it was mere opinion.

Respondent also represented that its remedy had been perfected as the result of many years of scientific research. The undisputed evidence showed that this was untrue.

We submit that the court below erroneously treated the question as one of definition when the true issue was deception. And deception must be tested from the standpoint of the general public, including the gullible and ignorant, whose purchases respondent solicited.

## ARGUMENT

### I

### THE COMMISSION HAD JURISDICTION TO REQUIRE RESPONDENT TO DESIST FROM MAKING FALSE REPRESENTATIONS, IN AID OF THE SALE OF ITS REMEDY, WHICH TEND TO DECEIVE THE PUBLIC AND WHICH ARE CALCULATED TO INJURE THE HEALTH OF PURCHASERS, EVEN IN THE ABSENCE OF A SHOWING THAT COMPETITORS' REMEDIES ARE SAFE AND ARE TRUTHFULLY ADVERTISED

The court below, after holding that the Commission had erroneously attempted to deal with representations of opinion, said (R. 477), "A broader question of the jurisdiction of the Commission underlies." The precise grounds upon which the court then proceeded to hold that the Commission lacked jurisdiction are not clearly stated, but the holding seems based in part on a preliminary inference (which we contend was wholly unjustified) that those who sold obesity remedies in competition with respondent were "relatively disreputable" and not engaged in "legitimate activities." (R. 479.) The holding may rest upon one or more of the following assumptions: (1) that the juris-

diction of the Commission under Section 5 is limited to "palming off" cases and to those situations indicating substantial tendency to restraint of trade or monopoly; (2) that a proceeding by the Commission where only "dishonest" competition exists is not "to the interest of the public"; (3) that Section 5 of the Federal Trade Commission Act can not be used to protect the trade of such competitors; (4) that a proceeding under Section 5 can be maintained only if it is affirmatively shown that the methods used by competitors are not likewise unfair.

The court said that it adopted the general view as to the foundation of the Commission's jurisdiction expressed in the partially dissenting opinion of Circuit Judge Denison in *L. B. Silver Co.* v. *Federal Trade Commission*, 289 Fed. 985, 992–1001. (R. 477–478.) The conclusion there reached was that Section 5 is limited to those situations indicating a substantial tendency to restraint of trade or monopoly and to "palming-off" cases. Cases of the latter type were regarded as covered by the section chiefly because of the decision of this Court in *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, *supra*, which was explained (p. 1000) as "a typical case of 'palming off' of his goods by one dealer, not as those of another individual, but as those of another class."

We submit that this interpretation is not supported by the words of the statute, the construction

placed upon it by this Court, or its legislative history.

The statute gives the Commission jurisdiction over "unfair methods of competition in commerce * * * if * * * a proceeding by it in respect thereof would be to the interest of the public" (p. 41, *infra*).

The words "unfair methods of competition" are not apt to designate simply restraints of trade and monopolies condemned by the Sherman Act. Certain decisions involving the Sherman Act used the words "unfair competition," but this does not suggest that these words when used in the Federal Trade Commission Act, which differs radically from the Sherman Act in scope, purpose, and method of enforcement, apply only to situations falling within the purview of the Sherman Act.

Nor do the words of the Act suggest that it applies only to the cause of action judicially known as unfair competition. The Act prohibits *unfair methods* of competition, not unfair competition. Both the House Bill and the Senate Bill covered only "unfair competition" and the words, "unfair methods of competition," were adopted in conference. (H. Rept. No. 1142, pp. 3, 12, 16, 63d Cong., 2d Sess.) The change indicates a purpose to avoid a construction which would limit jurisdiction to palming-off cases.

The opinion of this Court in the *Winsted* case nowhere suggests that the Commission's order in that case was sustained merely because of some

analogy between palming off goods as those of another class and palming off goods as those of a competitor. The failure to draw this analogy is important, since the construction of the Act urged by Judge Denison was before this Court in that case. The lower court (*Winsted Hosiery Co.* v. *Federal Trade Commission*, 272 Fed. 957) in holding that the petitioner had not used unfair methods of competition within the meaning of the Act, said (p. 960):

> There was no passing off of the petitioner's goods for those of another manufacturer. There was no combination in restraint of trade nor any attempt to establish a monopoly.

See also the summary of the Commission's brief in the official report of that case (258 U. S. 484).

*Federal Trade Commission* v. *Gratz*, 253 U. S. 421, also indicates that this Court regards Section 5 as embracing any method of competition characterized by deception or fraud. In discussing the scope of the words, "unfair methods of competition," this Court there said (p. 427):

> They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, * * *.

To the same effect, see *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475.

Even if the *Winsted* case is to be explained as a palming-off case, the present case can be equally

so explained. We fail to see the essential difference between selling nonwoolen goods as woolen and selling an unsafe and unscientific remedy as a safe and scientific remedy. In each case goods are sold as something other than what they are.

In order to give the Act a broad and flexible application, Congress, instead of declaring certain specific practices unlawful, made all unfair methods of competition unlawful. If the Court is to resort to the legislative history of the Act in aid of its construction, the reports of the committees dealing with this legislation show that the words "unfair methods of competition" were not to be rigidly limited to particular types of unfair competition. The House Conference Committee reported (H. Rep. No. 1142, p. 19, 63rd Cong., 2d Sess.):

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition it would undertake an endless task.

The Senate Committee reported (Sen. Rep. No. 597, p. 13, 63d Cong., 2d Sess.):

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it

> would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

The court below, in addition to construing Section 5 as applicable only to situations involving restraints or monopolies and to palming off cases, seemed to rest its jurisdictional holding in part on the inference that respondent's competitors were relatively disreputable. We submit that this inference was wholly unjustified. In the proceedings before the Commission it was shown that other obesity remedies were being sold in interstate commerce. (See pp. 13–14, *supra*.) No evidence was offered* or received as to the nature of these other remedies or as to the character of the representations made in advertising them, and certainly the courts can not take judicial notice that all obesity remedies are ineffective or sold by means of misleading representations. The court below said that the record showed, "without dispute or by implication which would hardly be denied," that the American Medi-

*The examiner excluded as improper cross-examination an inquiry whether the American Medical Association regarded any of these competitive remedies as "ethical." (R. 133–134.)

cal Association is engaged in a campaign against those proprietary remedies which it believes ought to be used by the public either not at all or only under supervision, and that the Federal Trade Commission and various "better business bureaus" have cooperated in attempting to stop objectionable advertisements of these remedies.[4] (R. 478–479.) But even if some proprietary medicines and some of their advertising matter is condemned by the American Medical Association, this does not warrant the inference that all of the twenty or more competitive obesity remedies disclosed by the record (R. 66, 111, 184), and the advertisements thereof, are "relatively disreputable."

But even assuming the inference to be justified, the more important issue is whether the Commission had jurisdiction under these circumstances. Section 5 of the Federal Trade Commission Act authorizes the Commission to issue a complaint whenever it has reason to believe that a person is using "any unfair method of competition in interstate commerce and if it shall appear to the commission that a proceeding by it in respect thereof

[4] The foregoing statements are based solely upon the allegations of respondent's answer in the Circuit Court of Appeals to the Commission's cross bill to enforce its order, which answer was not a part of the proceedings before the Commission and should not have been considered by the lower court in passing upon the Commission's jurisdiction. Section 5 of the Federal Trade Commission Act (*infra*, pp. 41–44) provides for a review of an order of the Commission thereunder upon the record of the proceedings before the Commission.

would be to the interest of the public." (*Infra*, p. 41.) We submit that the public interest is as deeply involved in misrepresentations which affect the health of the public as in those that affect its pocketbook. The Food and Drugs Act, c. 3915, 34 Stat. 768 (U. S. C., Title 21, Secs. 1–5, 7–15), is a legislative recognition that it is a matter of public concern to prevent the circulation of any article calculated to injure the health of the purchasing public. Cf. *Federal Trade Commission* v. *Kay*, 35 F. (2d) 160 (C. C. A. 7th), certiorari denied, 281 U. S. 764.

Nor is the public interest in preventing deception any the less great because the person against whom the Commission proceeds is engaged in a trade in which misrepresentation is rife, which was the situation that the lower court seemed to assume existed in the field of proprietary medicines. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, *supra*, indicates that a proceeding by the Commission under Section 5 to stop advertising which deceives a substantial part of the purchasing public is in the public interest, although the deceptive practice against which the Commission's order was directed was widespread in the trade. In that case this Court sustained an order of the Commission directed against use of the labels "Merino," "Wool," and "Worsted" on articles not made wholly of wool, notwithstanding the fact, to which the Court adverted (p. 492), that labels such as the Winsted Company employed, and particularly

those bearing the word "Merino," had long been established in the trade and were generally understood by it as indicating goods partly of cotton.

Section 5 is not primarily for the benefit of the individual trader. If he has been injured by unfair competition, he has his private remedy. The public interest in maintaining free and clean competition is the primary concern of the law. As this Court said in *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 27–28, *supra:*

> But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right. In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, a practice was suppressed as being against public policy, although no private right either of a trader or of a purchaser appears to have been invaded. In *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against.

If there is competition, if advertising is (as must be conceded) a method of competition, and if the methods of competition are unfair because goods are sold by means of false representations,

it is immaterial that the only competitors are those engaged in a trade which is in disrepute with the "best people." The Act does not cease to apply whenever its application will incidentally benefit private traders who are engaged in a trade of which many disapprove. The court below appears to have adopted the view that the unworthiness of a trade exempts those engaged in it from the requirements of the Act. Such a conception implies that a trade can, by the very inferiority of its standards, acquire immunity from laws of general application. So long as no law is enacted to the contrary, proprietary medicines generally, and obesity treatments specifically, no matter how disreputable, will continue to be sold, and that portion of the public that is most easily misled by deceptive advertising will continue to buy them.

If the Commission's jurisdiction is dependent upon the ethics of competitors, the Act is subject to the limitations of the law of unfair competition, a construction expressly repudiated in *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 27. It is immaterial that respondent's competitors could not maintain a private action because they would not come into equity with clean hands.

There remains a narrower question of jurisdiction than the court below seemed to decide. If the proceeding is in the public interest and if misrepresentation has been used in selling goods in competition with the goods of others, is the Commission nevertheless without jurisdiction unless it is

affirmatively established that competitors are guiltless of the same or of other forms of misrepresentation? If the Commission is without jurisdiction in such a situation, the practical effect will be to exclude from the scope of the Act any trade where deception is prevalent and where, consequently, public interest in the enforcement of the Act is greatest.

In *Federal Trade Commission* v. *Winsted Hosiery Co., supra*, this Court said (pp. 493–494):

> For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest.
>
> The fact that misrepresentation and misdescription have become so common in the knit-underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice.

We submit that the "honesty" of competitors is not a material issue in a proceeding by the Commission under Section 5 and that lack of proof of such honesty does not deprive the Commission of jurisdiction. The purpose of the antitrust laws, to

which the Federal Trade Commission Act is closely related, is to obtain for the public, through fair and free competition, the utmost of quality and service at the lowest price. If competition is to be unregulated in any trade where fraud and deception is general, competition in dishonesty will be substituted for competition in efficiency. In *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 476, *supra*, the Court, referring to the Clayton Act and the Federal Trade Commission Act, said:

> The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.

If the honesty of the methods used by competitors is a proper issue and affirmative proof thereof is essential to the jurisdiction of the Commission, the main issue in the proceeding will be befogged by a host of collateral issues. Approximately 300 pages of the record in this case are devoted to testimony taken on the question of whether or not respondent's representations were misleading. Equally extensive testimony might be introduced upon a like issue as to each of respondent's competitors.

It can not be assumed that every vendor of an obesity remedy referred to in the testimony advertised its product as scientific or that all of their remedies were unsafe. If the honesty of the meth-

ods of competitors is a material issue, then the degree of honesty would also seem material. In *Hills Bros.* v. *Federal Trade Commission*, 9 F. (2d) 481, 484–485 (C. C. A., 9th), the court in reviewing a proceeding by the Commission under Section 5 said:

> The petitioner also offered to prove that a concern in Los Angeles was selling coffee, and that publishers throughout the country were selling magazines, at fixed prices in other states, under agreements to maintain these prices, and refused to sell to dealers who would not maintain the prices agreed upon. An objection to this class of testimony was sustained, and the ruling is assigned as error. If the concerns in question did nothing more than the petitioner has done, according to its own contention, they did not violate the law, nor has the petitioner violated the law, for reasons hereinafter stated. If, on the other hand, the petitioner has violated the law, it would avail nothing to prove that others were equally guilty. Proof of the methods employed by others would be of little avail in any event, unless the methods employed were similar, and in order to determine the similarity of methods the commission would be compelled to hear and try many cases, instead of only one. There was no error in the rulings complained of.

In *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910, 912 (C. C. A. 2d), the court, in re-

viewing a proceeding by the Commission under Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act, said:

> The argument that other competitors are doing substantially what the petitioners do has no effect. It is not important.

See to the same effect, *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673, 686 (C. C. A. 8th).

Even if one against whom the Commission has issued a complaint charging unfair methods of competition may introduce evidence that his competitors are also dishonest (which we do not concede), it does not follow that the Commission lost jurisdiction in this case by failing to show affirmatively that the methods used by respondent's competitors were fair and honest. In *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, 302, this Court referred to "the familiar presumption of rightfulness which attaches to human conduct in general."

It may be urged finally that the Commission should not deal with commerce in articles which fall within the scope of the Food and Drugs Act. Such a contention goes to the discretion, hardly to the jurisdiction, of the Commission. Furthermore, the proceeding in the present case is directed against misleading advertising, and that Act applies to false and fraudulent statements regarding the curative or therapeutic effect of drugs only when these

appear on, or are contained in, the package or label (c. 3915, 34 Stat. 771; c. 352, 37 Stat. 416; U. S. C., Title 21, Sec. 10). In any case where a drug is misrepresented by advertising not physically connected with the package or label, the intervention of the Commission is clearly warranted. *Henderson, Federal Trade Commission*, p. 232.

## II

RESPONDENT'S REPRESENTATIONS AS TO THE CHARACTER OF ITS PRODUCT TENDED TO MISLEAD A SUBSTANTIAL PART OF THE PURCHASING PUBLIC AND THEREFORE CONSTITUTED AN UNFAIR METHOD OF COMPETITION OVER WHICH THE COMMISSION HAD JURISDICTION

The court below said that the Commission's cease and desist order contained six specific prohibitions against advertising, which, "taken together, reduce to two." (R. 471.) The court thereupon treated the question of the Commission's jurisdiction as dependent upon whether the words "safe" and "scientific," as applied to respondent's remedy, could be conclusively determined to be true or false "as disputed facts are decided." (R. 473–474.)

We submit that the court below misconceived the issue. The issue was whether respondent's advertisements tended to mislead and deceive a substantial part of the purchasing public and whether any part of the Commission's order was properly phrased to terminate such deception. The issue was not whether the words "safe" and "scientific" may be variously interpreted or whether they are ca-

pable of being understood in a sense in which they are true as applied to respondent's remedy.

The Commission found, and respondent took no exception to the finding (*supra*, pp. 5–6), that respondent advertised that the medical properties of Marmola are "safe" and "pleasant" and that it may be used "without discomfort, inconvenience, or danger of harmful results to the physical health of the users." (R. 23.) The Commission ordered respondent to cease and desist from making these representations. (R. 26–27.) It is now urged that the Commission had no jurisdiction to deal with these representations, not on the ground that its remedy is in fact safe, but on the ground that the safety of using any patent medicine can be only relative and that the safety of the remedy is the subject of scientific controversy. But respondent's unconditional representation that Marmola was safe and harmless implied that its safety was a matter upon which medical opinion was in agreement. Since in fact there was no such agreement, respondent's representation that Marmola could be safely taken was plainly misleading.

The character of respondent's representations is very different from the ordinary "puffing" of a seller. A representation that a given product offers "the greatest value for the least money" in its field is generally understood as an expression of opinion, which, if it deceives at all, could not ordinarily be condemned as an unfair method of com-

petition. But respondent represented as established fact what was, at best, mere opinion.

Whether respondent's advertisements were or were not misleading may be tested by comparing their effect on a prospective purchaser with the effect on such a purchaser if respondent advertised that many medical experts believe that Marmola can be safely taken without first consulting a physician, but that numerous other medical experts consider it highly dangerous to take Marmola without medical advice. An advertisement so phrased would truthfully present the situation disclosed by the record in this case after giving full effect to the testimony of respondent's witnesses.

The court below, in suggesting that respondent could properly advertise Marmola as safe, said (R. 475):

> * * * the results produced by too much thyroid are those which are generally called nervousness, including overtension, loss of sleep, etc. Whenever these unusual conditions develop, the directions are to stop the treatment and consult a physician.

The "directions" to which the court referred are contained in the booklet enclosed in each box of Marmola, but this booklet does not warn purchasers to stop taking Marmola when such symptoms occur. The only warning of any kind is the following sentence in the second paragraph under the heading "ORDER FROM DRUGGIST" (R. 422):

> Consult your own physician if you want special advice in any unusual condition.

The above sentence is buried in a booklet (R. 417–424) the whole tenor of which is to dispel any doubt as to the safeness and efficacy of respondent's remedy. Thus, under the heading "DIRECTIONS," the booklet reads (R. 418):

> Take one Marmola tablet after each meal and one at bedtime—four a day. Do this regularly. Try not to miss a dose, for the cumulative effects are important.
>
> * * * * *
>
> Do not permit interruption until the results are complete. * * *

The following appears under the heading "HAVE CONFIDENCE" (R. 420):

> Confidence should be based on the fact that Marmola contains the leading internal factor in fat reduction known to modern science. That factor is recognized the world over. No modern physician can dispute it. You have probably read articles by physicians in magazines, stating how an active thyroid affects fat.
>
> You should also have confidence because Marmola is prepared in a world-famous laboratory. The doctors and scientists in that laboratory are among America's leaders in gland therapy. They have devoted decades to its study.

Under the heading "WHEN TO STOP" nothing is said about consulting a physician or about the pos-

sibility of unusual conditions developing, but purchasers are advised to stop Marmola when normal weight has been attained or "when you are satisfied." (R. 421.)

The court unduly simplified the case when it referred only to the words "safe" and "scientific." These words are merely a convenient summary of respondent's varied representations. A few of those in which Marmola was held out as being scientific, or the result of scientific research or made from a scientific formula are collected in a footnote.[5] Some of them seem patently false, as that a "famous medical laboratory perfected" Marmola.

To test the capacity of respondent's representations to deceive we may compare the impression which they give—that Marmola has been perfected as the result of many years of scientific research by

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[5] It [Marmola] reduces fat by correcting the gland cause, without abnormal exercise or diet. It is the modern, scientific way. Com. Ex. 6, No. b.

You should know this method based on scientific research. Com. Ex. 7, No. a.

They [Marmola tablets] are based on scientific research, and act to correct the cause. Com. Ex. 7, No. e.

Then a great medical laboratory perfected a tablet based on this principle. Com. Ex. 9, No. 91.

Marmola is not a secret prescription. The complete formula appears in every box. Also an explanation of results which so delight its users. Com. Ex. 9, No. 91.

A great medical laboratory, years ago, embodied this new method in Marmola prescription tablets. Com. Ex. 9, No. 89.

They are based on scientific research on the causes of excess fat. A famous medical laboratory perfected them. Com. Ex. 9, No. 83.

a great medical laboratory—with the true facts—that Marmola has been sold for over twenty years without substantial change in the formula except to decrease the quantity of thyroid; that respondent and its predecessor company were organized to sell Marmola; that the formula was acquired from the company which then made Marmola; that the present owner of respondent, who helped organize respondent's predecessor, does not remember whether he ever knew the doctor who evolved the formula for Marmola; that this present owner is absolutely lacking in any medical or scientific knowledge or training. (*Supra*, pp. 7–9.)

Whether respondent's statements tend to mislead and deceive must be tested from the standpoint of those to whom they are directed, certainly not the least gullible and ignorant. In *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47 (C. C. A. 6th), the court, in reviewing an order of the Commission under Section 5 directed against use of the word "naphtha" in the brand name of a soap containing only kerosene, said (p. 48):

> We do not think it important whether kerosene is, or is not, naphtha in a scientific or legal sense. The question is whether the consuming public recognizes a distinction between the two, and believes and understands that a soap containing naphtha is a better cleansing agency than a soap containing kerosene.

In a case of unfair competition the court in *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 Fed. 73, 75 (C. C. A., 2d), said:

> The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.

This Court in *United States* v. *95 Barrels of Vinegar*, 265 U. S. 438, in holding that vinegar was misbranded under the Food and Drugs Act, said (pp. 443):

> Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.

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Since this Court is reviewing only the question of the Commission's jurisdiction, we have not attempted to show that there is sufficient evidence to support the findings of the Commission, but only to show that the nature of respondent's representations are such, in the light of the evidence, as to fall within the jurisdiction of the Commission under Section 5.

CONCLUSION

We submit that the decree of the Circuit Court of Appeals should be reversed and the case remanded to that court for further proceedings.

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APRIL, 1931.

# APPENDIX.

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. Code, Title 15, Sec. 45), provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person,

partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause

notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of

appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

* * * * *